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No. 82-1145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RHONDA ROTHBALLER,

and

THE PEORIA JOURNAL STAR, INC.,

Petitioners,

v.

FRANK M. WANLESS,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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MAY IT PLEASE THE COURT:

In accordance with Rule 22 of the Rules of the Supreme Court of the United States, the Respondent, Frank Wanless, provides the following Response to the Petition for Writ of Certiorari to the Illinois Supreme Court filed by Rhonda Rothballer and The Peoria Journal Star, Inc.

We respectfully submit that there exist no grounds for this Court to exercise its discretion to review the judgment of the Fourth District Appellate Court of the State of Illinois sitting in the stead of the Third District Appellate Court in this matter.

STATEMENT OF FACTS

At the time the incidents complained of took place, Frank Wanless served as attorney for the Board of the Village of Morton, Illinois. Rhonda Rothballer, a reporter for The Peoria Journal Star, a newspaper of general circulation in the community in which Frank Wanless practices law and in the village which he served as attorney, wrote and the newspaper published an article, stating among other things: ". . . Frank M. Wanless has been paid twice for preparing annexation papers—by the village and by clients wishing to annex to the village."

The article in question and a subsequent publication, which is likewise the subject of the suit in caption, stated that Wanless' conduct constituted a conflict of interest.

The trial court granted a Motion for Summary Judgment filed in behalf of the defendant newspaper and its reporter. The matter was appealed to the Third District Appellate Court which transferred the same to the Fourth District pursuant to the Order of the Chief Justice of Illinois. After having considered the briefs of the parties and hearing oral argument, the Appellate Court made the following findings:

(1) The statements complained of in Wanless' suit for libel were not capable of an innocent construction.

(2) The statements were not true as a matter of law, and

(3) A trier of fact could find that the statements were made with actual malice.

The Appellate Court reversed the trial court and sent the matter back for a hearing on its merits. Within the time limited by the Rules, the defendant newspaper and its reporter filed their Petition asking that the Illinois Supreme Court review the matter. That Petition was denied.

ARGUMENT

The State Court Correctly Applied The *New York Times* Standard In Ruling That Questions Of Fact Remain For A Jury Regarding Petitioner's Publications.

The questions presented to this Court are raised by the decision of the Fourth District Appellate Court of the State of Illinois correcting an erroneous application of the standard for granting summary judgment under the Rules of Civil Procedure in the State of Illinois.

The matters which this Court is asked to review do not present any special or important reasons for exercising this Court's discretion in granting the petition. U.S. Sup.Ct. Rule 17(a).

There is no decision by a state court of last resort of a federal question which conflicts with another state court of last resort or of a federal court of appeals. U.S. Sup.Ct. Rule 17(b).

There is no decision of a state court which has decided previously unsettled question of federal law. There is no decision of a state court which decided a federal question in conflict with the applicable decisions of this court. U.S. Sup.Ct. Rule 17(c).

This petition is generated solely by ruling of the Fourth District Appellate Court of the State of Illinois that there exists a question of fact on the allegations of defamatory publications on the part of the defendants below, Rhonda Rothballer and The Peoria Journal Star. There has been no verdict or decision finding Rothballer or the The Peoria Journal Star responsible in damages for its publications. The court below, in its opinion, stated:

> We make no decision regarding the ultimate issue of whether the plaintiff may recover from the defendants. We merely hold that the factual questions heretofore outlined are for the jury to answer. Petitioner's Brief for Certiorari, Appendix, p. 6a.

There has been no rule of law enunciated which impermissibly conflicts with the asserted rights of the petitioner under the First Amendment of the United States Constitution. No demonstration has been made at the procedural machinery in a First Amendment defamation case has not been properly employed, or that the present machinery is constitutionally inadequate.

The newspaper contends that the Appellate Court has overlooked or ignored the "actual malice" test established by this Court in *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The words of the decision of the Appellate Court are in direct contradiction to the newspaper's contention. The Appellate Court makes it plain at in its opinion that its decision applies the underlying *New York Times* standard to the facts as presented in the Motion for Summary Judgment . . . "plaintiff has shown avenues of investigation not pursued by the defendants . . . these omissions may well be excusable; however, the issue of whether the facts and circumstances of this correct case disclose a reckless disregard for the truth is not so free from doubt that an answer can be said to exist as a matter of law . . .". Petitioner's Brief for Certiorari, Appendix, p. 5a.

The publications under review cannot be said to have been true as a matter of law. No evidence of that conclusion has been presented by the newspaper and its reporter and none has been suggested to the Appellate Court or to this Court. The implication that Wanless was guilty of a conflict of interest raised a question of fact which the Appellate Court found should be submitted to a trier of fact.

The Appellate Court has simply said that the question of whether Wanless was guilty of a conflict of interest was one for the trier of fact and not for a conclusion of law by the court. Wanless has alleged that the newspaper had access to information from which the necessary conclusion arose that the Illinois Supreme Court's Attorney's Disciplinary and Registration

Commission had found that Wanless was not guilty of a conflict of interest. If the newspaper and this reporter had such information, a failure to print it could supply the basis of a decision by the trier of fact that there was "actual malice" in the printing and publication of the articles charging such a conflict. This is more than mere failure to investigate; rather, it is evidence of a subjective state of mind on the part of the petitioners at the time the article was published. The Peoria Journal Star makes much use of the "actual malice" test as a defense but seeks to deny petitioners the opportunity to prove the state of mind of The Peoria Journal Star and its reporter at the time these articles were published. This is a decision which is peculiarly within the province of a finder of fact, and the Appellate Court recognized that at the time of its decision. Furthermore, Wanless has alleged that the reporter Rothballer had access to the records of the Attorney's Disciplinary and Registration Commission and that she had interviewed those people who had filed grievances against Wanless. If at trial, it should develop that these charges are true, then the newspaper and its reporter certainly acted with actual malice when they published charges of a conflict of interest against Wanless with full knowledge that the charges were held to have been unfounded by the Attorney's Registration and Disciplinary Commission of the Illinois Supreme Court.

In their petition, The Journal Star and its reporter, in seeking to eliminate any factual dispute, only serve to underline it. They acknowledge there exists a disagreement between Wanless and other principals concerning Wanless' role in preparing petitions and in the applicable standard for conflicts of interest. Petitioner's Brief for Certiorari at p. 11. They also glibly introduce into the dispute terms such as "substantial responsibility" and "representation" from the Code of Professional Responsibility without recognizing that any dispute over the application of those terms to Wanless' conduct is factual which resolution is inherently for the jury.

It cannot be stressed too strongly that the Appellate Court has held only that the issues presented raised questions of fact to be determined by a trier of fact, and the newspaper and its reporters were not entitled to a judgment as a matter of law.

The decision of the Fourth District Appellate Court and the decision of the Illinois Supreme Court in denying petition for leave to appeal, do not in any way inflict upon The Peoria Journal Star or other members of news media any standard which contradicts the mandate of the First Amendment to the United States Constitution. Rather, the Illinois Appellate Court and the Illinois Supreme Court have merely affirmed that when issues of fact remain following the submission of affidavits and the completion of discovery, regardless of the defendant or the standard which the plaintiff must use to prove the defendant responsible, that plaintiff is entitled to have a jury determine those questions of fact.

Frank Wanless has not had the day in court to which he is entitled. The Illinois Appellate Court has determined that his right to a trial was wrongfully denied by the granting of a motion for summary judgment. This Court is presented with no valid reason why its jurisdiciton should be invoked to reach some other determination. Nor is it presented with any valid reason why the asserted rights of The Peoria Journal Star and its reporter under the Constitution should prevail to prevent the plaintiff from having his rights under the Constitution to have a jury determine the issues presented by the complaint.

CONCLUSION

For these reasons, we urge this Court to allow the matter to be heard on its merits in the trial court and deny the Petition for Writ of Certiorari to the Illinois Supreme Court.

Respectfully submitted,

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